

# INFORMATION LETTER

Not for  
Publication

NATIONAL CANNERS ASSOCIATION

For Members  
Only

No. 775

Washington, D. C.

February 17, 1940

## LABELING RULINGS

### Decisions by Food and Drug Administration Affect Tomatoes and Maraschino Cherries

Canned tomatoes packed in tomato juice may be labeled "With Added Tomato Juice," the Food and Drug Administration has ruled.

The standard of identity for canned tomatoes, promulgated by the Secretary of Agriculture last summer, prescribes that the label declaration for tomatoes packed in juice shall be "With Added Strained Tomatoes."

After consideration of protests against this form of statement, the Administration decided that the declaration "With Added Tomato Juice" would be satisfactory. The pertinent paragraph of a letter on the subject, made public by the Food and Drug Administration, is as follows:

"The Department concludes that optional ingredient (a) (3), Section 53.040, in canned tomatoes has now been standardized under its common or usual name as 'Tomato Juice' and therefore the label declaration 'With Added Tomato Juice' may now be substituted for the label declaration 'With Added Strained Tomatoes.'"

Cherries dyed red and packed in a flavored sugar sirup, in imitation of the genuine marasca cherries preserved in maraschino, may be labeled simply "Maraschino Cherries," the Food and Drug Administration has decided. Formerly the Administration held that only the genuine marasca cherries preserved in maraschino were entitled to this name.

However, the Administration now has concluded, from evidence submitted, that there is widespread acceptance of the name "Maraschino Cherries" for cherries that have been dyed red, impregnated with sugar, and packed in a sugar sirup flavored with oil of bitter almonds or a similar flavor. In view of this, the Administration believes that the term "Maraschino Cherries" may be regarded as the common or usual name for this product within the meaning of the Food, Drug and Cosmetic Act, and that the product may be so labeled when shipped in interstate commerce.

### Court Dismisses Area of Production Suit

The Federal District Court for the Eastern District of Pennsylvania, in a decision rendered recently, has dismissed an action brought by several Pennsylvania mushroom canners to enjoin the enforcement of the Wage and Hour Administrator's definition of "area of production". The "area of production" definition controls the complete exemption, afforded to processors of fruits and vegetables, from the wage and hour provisions of the Federal Fair Labor Standards Act. The Pennsylvania mushroom canners had contended that the definition was arbitrary and unreasonable in that it denied them the exemption even though their canning plants were located within a definite and well-defined area of production of mushrooms.

The Court did not discuss, or give any opinion concerning, the reasonableness and legality of the definition of "area of production". The decision was based entirely upon jurisdictional grounds, and the Court concluded that the canners had no legal standing to question the validity of the definition since they could not demonstrate that there had been any threats that the penal provisions of the Wage and Hour Law would be enforced against them.

### Watchmen Subject to Wage-Hour Law

In a recent case decided in a Federal Court in North Carolina, watchmen have been held to be employees subject to the wage and hour provisions of the Fair Labor Standards Act. The ruling of the Court sustains the interpretation of the Act as given by the Wage and Hour Division in its first interpretative bulletin. In the bulletin the Division stated that maintenance workers, watchmen, clerks, stenographers, messengers, and all other employees engaged in processes or occupations necessary to the production of goods for interstate commerce are within the scope of the Wage and Hour Law.

## WAR EMERGENCY CLAUSES

### Drafts to Meet Various Problems Suggested for Study by Canners

At the meeting of the Administrative Council held in Washington in September, shortly after the outbreak of war in Europe, consideration was given to problems which the canning industry will be compelled to face, in the remote possibility that the United States might become a belligerent, or that emergency conditions might arise in this country as a result of hostilities abroad. Among subjects discussed was the possibility of including in canners' sales contracts supplementary clauses which, to the greatest possible extent, would guard against loss from the disruption of normal trade that might be expected from war conditions in this country. It was believed that this purpose could be accomplished to some extent by the use of clauses designed to prevent war-time speculation in canned foods, to protect the canner against extreme increases in the cost of raw materials, labor, etc., to relieve the canner from liability for failure to deliver if his production were taken by the Government under a "friendly commandeering," and to meet some of the problems which might be caused by neutrality legislation.

Accordingly, the Association's counsel was directed to draft and to submit appropriate contract clauses to the Administrative Council at its January meeting during the annual convention. Neither the Administrative Council nor the Board of Directors felt that the current situation demanded any immediate action upon these clauses. It was, however, deemed advisable to publish them, along with a discussion of the problems that they are designed to meet,

so that canners might have opportunity to study them. These clauses *have not* been approved by either the Board of Directors of the National Canners Association or the Joint Conference Committee of Canners and Distributors, nor have any recommendations as to the use of these clauses been made by either of these organizations. They are set forth here merely for the information of the industry and for study by individual canners.

#### Non-Assignability of Canned Food Contracts

One of the subjects discussed at the meeting of the Administrative Council in September was the discouragement of possible speculation in canned foods during any war-time buying activity. At that time, shortly after the outbreak of hostilities in Europe, there was some fear of a runaway market with large speculative price increases. While statistics from the last war indicated that these fears were largely unwarranted (this has been confirmed by experience since September), it was thought desirable to explore the possibility of discouraging speculation by making future contracts non-assignable.

It is, of course, impossible for the canner, by any contract provision, to control absolutely the disposition of his products after they have been sold and delivered to the buyer. And where canned foods are sold f.o.b. cannery, and the contract generally provides for shipment to the order of the buyer, the degree of control which the canner may exercise over the ultimate destination of the goods is quite small. In these circumstances, there is very little that the canner can do to prevent speculation. It is legally possible, however, for the canner to prevent the formal assignment of future contracts, and a provision forbidding such assignment should, to some extent, be effective in discouraging speculation. For this purpose the following clause has been suggested.

"This contract is non-assignable without the consent of the Seller, and without waiving any right to demand performance by the Buyer, Seller may refuse to make delivery to any person to whom this contract has been assigned without Seller's consent."

#### Pro-Rata Delivery in the Event of National Emergency

One of the problems which canners might be compelled to face, should the United States become involved in war, or should a national emergency arise as a result of foreign wars, is the substantial possibility that they would be unable to fulfill their future contract commitments. A number of contingencies might arise that would impede the ability of the canner to deliver in full on all future contracts. At the very outset, the provisions of the National Defense Act of 1916, which are still effective, confer upon the President the power to commandeer any commodities which may be needed in the prosecution of a war. This power exists not only when the United States is actually at war, but "when war is imminent." Under this law the President could place with any canning company an order for the company's entire production, and the company would be legally obligated to give this Government order precedence over all prior contract commitments. In addition, the President has the power to take over and operate any factory or plant that is capable of producing articles needed for war purposes, which presumably would include canning plants.

While a formal commandeering of a canner's factory or production would certainly make it impossible for him to fulfill

his future contracts, this is not the most serious problem that might arise. For it is settled that compliance with such a formal Government commandeering is a complete defense to an action for failure to fulfill prior contract commitments. See *Moore & Tierney v. Roxford Knitting Co.*, 250 F. 278, affirmed 265 F. 177 (CCA 2nd 1920) and *Wilson & Company v. Curlett*, 140 Md. 147, 117 Atl. 6. Moreover, the experience during the past war demonstrates that it is not likely that there would be many instances of formal commandeering. During the past war, the Government, instead of exercising its legal power formally to requisition the articles and commodities which it needed, relied for the most part upon the patriotic cooperation of manufacturers. In other words, the Government merely placed requests with the various manufacturing concerns, and these were voluntarily complied with. It is likely that the same procedure would be followed in any future emergency. Indeed, this was forecast by Major Paul P. Logan, of the Army Industrial College, in his address at the January Convention explaining the Army's plan for industrial mobilization. He said:

"In the future, as in the past, it will be American cooperation—not compulsion—which will win the war."

Difficult legal questions are presented when a canner voluntarily complies—as canners undoubtedly would do—with the so-called "friendly commandeers," and there is considerable doubt whether or not such voluntary compliance relieves the canner of responsibility for fulfilling any contracts which he may previously have made with private individuals. Compare *Wilson & Co. v. Curlett*, 140 Md. 147, 117 Atl. 6. Consequently, the Administrative Council felt that it would be desirable to consider the possibility of including in canners' sales contracts some provision protecting the canner in the event that he complies with "friendly commandeers."

Finally, even though there are no formal or informal commandeers, it might well happen that Government regulations or restrictions applicable to other industries, such as steel, fuel, transportation, etc., would prevent performance of contracts by canners. Or even if there are no formal regulations or restrictions applicable to these other industries, there may be a marked scarcity of, or increase in the prices of, essential raw materials and transportation due to large war-time Government purchases. Here again, Major Logan, in his address at the Convention, pointed out these possibilities. Referring to experience in the past war, he said that the railroads might become congested, and that frantic attempts by industry to secure labor and material can easily start prices upward in a dizzy swirl. In addition, he stated that one of the basic factors of the Army's industrial mobilization plan was the use of "priorities," by which the flow of raw materials, fuel, and services such as transportation, to various manufacturers would be regulated. Under this system of "priorities," the Government could specify which industries were to receive raw materials and transportation, and the quantity which they could utilize.

The possibility of a scarcity, or an increase in the cost, of raw materials presents a very difficult problem. As a practical matter, it is impossible to prepare any contract provision which would provide for adjustments in price in the event that a canner's costs are increased. Consequently, it is necessary to rely upon a provision that relieves the canner from failure to deliver, or that authorizes pro-rata delivery, when a canner is prevented from making full delivery on his

future contracts by reason of increases in the cost of, the scarcity of, or Government regulations or restrictions applicable to, raw materials, fuel and transportation.

As a partial solution for these various problems, the following clause, authorizing pro-rata delivery should any of these contingencies develop, has been suggested for consideration:

"If, as the result of any war in which the United States becomes a belligerent or during any national emergency proclaimed by Congress or the President arising out of any foreign wars, (1) Seller's factory or factories or all or any portion of Seller's production is commandeered or requisitioned by the Federal Government; or (2) Seller's production or sales are regulated or restricted by the Federal Government; or (3) Seller, in compliance (whether such compliance is mandatory or not) with any Government request, order, contract, allotment, notice, or 'friendly commandeered' received in writing after the date of this contract, delivers to or reserves for the Government all or any portion of Seller's production; or (4) Seller with reasonable effort and at reasonable cost is unable to obtain the raw materials, supplies, fuel, labor, or transportation necessary to enable it to fulfill its contracts; and as a result, Seller is unable to fulfill all of its contract commitments to all purchasers of any article covered by this contract, Seller shall pro-rata among all such purchasers its available supply, if any, of such article, and a delivery of Buyer's pro-rata share, if any, shall constitute a full performance of this contract. If under the conditions specified there is no available supply to be pro-rated, Seller shall not be liable for failure to deliver."

#### Export Sales on Credit Under the Neutrality Act

At the time the Administrative Council met in September the present Neutrality Act had not been adopted by Congress. It was enacted in November, 1939. This Act creates a number of problems for canners who make sales in the export trade, but few of these problems can be made the subject of contract provisions. There is, however, one contract clause which might prove helpful in contracts relating to exports. Section 7(a) of the Neutrality Act makes it a penal offense for any canner to sell on credit to a foreign government, or to any person or agency who is acting for or on behalf of a foreign government, which has been designated by Presidential proclamation as a belligerent. (The details of this prohibition were discussed in full in INFORMATION LETTER No. 767, of November 11, 1939.) The statute provides that whenever anyone shall "knowingly" violate the prohibition against the extension of credit to belligerents, he may, upon conviction, be subject to criminal penalties.

Whether or not a canner has violated the provisions of this section in any particular case, would depend upon whether or not he had actual knowledge of the fact that a buyer was acting for or on behalf of a foreign belligerent. There will be many cases, however, when the status of foreign buyers will be unknown. And for this reason it would, perhaps, be desirable to include in contracts relating to exports a clause under which the buyer certifies that he is not acting for or on behalf of a foreign belligerent. Such a clause would read as follows:

"If the terms of sale specified under this contract are other than the payment of cash at or prior to the transfer of full ownership in the goods to Buyer, Buyer by executing this contract hereby certifies that in so doing he is not acting for or on behalf of the government of any belligerent state

named by the President in a proclamation issued under Section 1(a) of the Neutrality Act of 1939 and effective on the date of execution of this contract."

Where payment is not received prior to the passage of title to the goods to the buyer, the sale is on credit. Where goods are sold on credit for shipment to a buyer located in a belligerent country, the suggested clause will be helpful. For in such case the other provisions of the law require that title pass prior to export. (See INFORMATION LETTER No. 767.) Unless payment is received at that time, the sale is on credit. This is permitted by the statute except where it is known that the buyer is acting for the belligerent government. Thus, on all credit sales for export to a belligerent the canner must assure himself that the purchaser is a private and not a governmental buyer.

Even where goods are sold on credit for shipment to a buyer in a neutral country, the suggested clause should prove useful. For such buyer may in fact be acting for a belligerent, and the extension of credit to him may thus be unlawful. For his own partial protection the canner selling for export on credit might well consider the use of this clause irrespective of the country to which the goods are consigned.

#### Fleming's Nomination Favorably Reported

The nomination of Col. Philip B. Fleming to be Administrator of the Fair Labor Standards Act has been favorably reported to the Senate by the Committee on Education and Labor. This action had been preceded by Congressional enactment of special legislation permitting Colonel Fleming to hold the position of Administrator without jeopardy to his military status.

Legislation to extend until 1943 the authority of the President to enter into foreign trade agreements under the Reciprocal Trade Agreements Act has been favorably reported to the House by the Committee on Ways and Means. The resolution will come before the House for debate on Monday, with the House scheduled to reach a vote on the measure on Friday.

At the close of recent hearings on the McCormack compulsory fishery inspection bill (H. R. 6130), Chairman Bland of the House Committee on Merchant Marine and Fisheries announced that his Committee would commence a general inquiry into the problems of the United States fisheries the latter part of March.

The McCormack bill, as introduced, would impose a mandatory inspection and certification service on all fishery products. Upon the development of widespread opposition to the proposal, the proponents of the measure recommended that it be amended to apply only to frozen fish and frozen fishery byproducts.

#### Stocks and Shipments of Pitted Red Cherries

Stocks of canned pitted red cherries on February 1, 1940, included 351,077 cases of No. 2's (compared with 246,262 cases on February 1, 1939), and 249,829 cases of No. 10's (410,566 cases a year earlier). Shipments from July 1, 1939, to February 1, 1940, amounted to 1,667,611 cases of No. 2's and 861,465 cases of No. 10's. Shipments from July 1, 1938, to February 1, 1939, amounted to 630,798 cases of No. 2's and 572,136 cases of No. 10's.



The following table shows stocks on February 1, 1940, and shipments during January, by can sizes and regions:

	24/2's Cases	6/10's Cases	Misc. Cases	Total Cases
<b>New York and Pennsylvania:</b>				
Stocks: sold not shipped.....	42,276	21,478	2,355	66,009
Stocks: unsold.....	7,802	8,402	98	16,302
Stocks: total.....	50,078	29,880	2,353	82,311
Shipments for January.....	23,431	4,600	7,439	35,470
<b>Mich., Wis., and Ohio:</b>				
Stocks: sold not shipped.....	78,607	23,784	3,235	105,626
Stocks: unsold.....	205,668	90,764	1,450	297,882
Stocks: total.....	284,275	114,548	4,685	403,508
Shipments for January.....	32,930	19,305	1,103	53,338
<b>Western States:</b>				
Stocks: sold not shipped.....	5,923	36,946	2,458	45,327
Stocks: unsold.....	10,801	68,455	3,323	82,579
Stocks: total.....	16,724	105,401	5,781	127,906
Shipments for January.....	3,306	10,179	19	13,504
<b>Total United States:</b>				
Stocks: sold not shipped.....	126,806	82,208	7,948	216,962
Stocks: unsold.....	224,271	167,621	4,871	396,763
Stocks: total.....	351,077	249,829	12,819	613,725
Shipments for January.....	59,667	34,084	8,561	102,312

### Unsold Stocks of Canned Salmon

Unsold stocks of canned salmon on January 31, 1940, amounted to 1,611,616 cases as compared with 2,140,931 cases on December 31, 1939, and 2,396,895 cases on January 31, 1939, according to statistics compiled by the Association of Pacific Fisheries. These figures are based on reports from companies canning 99 per cent of the 1939 pack and 98 per cent of the 1938 pack.

The following table gives details on the unsold stocks:

Grades or Varieties	Tails (1 pound)	Flats (1 pound)	Halves (8 dozen)	Total Jan. 31, 1940	Total Jan. 31, 1939
<b>Chinooks or Kings:</b>					
Fancy Red.....	8,266	3,738	17,583	29,587	61,991
Standard.....	441	4,628	5,172	10,241	20,929
Pale.....	598	138	363	1,099	1,655
White.....	181	96	.....	277	550
<b>Puget Sound Sockeyes.</b>	9	8,306	22,061	30,376	59,440
<b>Alaska Reds.....</b>	976,923	13,373	103,318	1,093,614	1,235,308
<b>Cohoos, Silvers, and</b>					
Medium Reds.....	33,118	9,484	32,695	75,297	119,724
Pinks.....	203,475	7,921	32,455	243,851	724,183
Chums.....	120,819	5	5,028	125,852	170,631
Bluebacks.....	.....	.....	438	438	1,336
Steelheads.....	.....	467	517	984	1,139
<b>Total.....</b>	<b>1,343,830</b>	<b>48,156</b>	<b>219,630</b>	<b>1,611,616</b>	<b>2,396,895</b>

### Early Association Director Dies

Charles W. McReynolds, elected member of the Board of Directors of the National Cannery Association in 1912, died January 30, at the age of 74, at his home at Kokomo, Ind. Mr. McReynolds operated a canning factory in Tipton County for many years.

### New Lima Bean Varieties

Baby Potato, Early Baby Potato, and Illinois Large Podded lima beans, new varieties developed in breeding work at the Illinois Experiment Station, are described in a new publication issued by the Station, Bulletin 461, entitled "Three New Varieties of Bush Lima Beans." Plant characteristics and yield of these new varieties are compared with Henderson Bush. Copies of this bulletin may be obtained upon inquiry addressed to the Experiment Station, at Urbana, Illinois.

### Pack of Canned Beets in 1939

In the following table are shown details of the 1939 beet pack by can sizes, region, and style of pack. The total figures for each style of pack include the miscellaneous can sizes.

Style of Pack	24/2's Cases	48/8's Cases	48/1's Cases	24/2½'s Cases	6/10's Cases	Total Cases
<b>East</b>						
Whole.....	115,751	.....	36	14,746	40,877	190,864
Cut.....	61,504	.....	.....	132,019	16,519	212,134
Sliced.....	110,836	.....	2,335	15,737	86,109	371,174
Diced.....	43,320	9,387	5,550	130	11,283	93,830
Shoestring.....	54,057	.....	.....	.....	18,603	104,863
<b>Total East.....</b>	<b>385,468</b>	<b>9,387</b>	<b>7,921</b>	<b>162,632</b>	<b>173,391</b>	<b>973,865</b>
<b>Midwest</b>						
Whole.....	121,687	.....	1,354	44,357	28,408	205,045
Cut.....	71,886	.....	.....	17,715	60,114	183,119
Sliced.....	117,267	.....	1,106	36,371	26,604	229,711
Diced.....	32,305	8,697	2,511	642	5,248	46,463
Shoestring.....	31,391	.....	.....	324	2,378	34,993
<b>Total Midwest.....</b>	<b>374,536</b>	<b>5,697</b>	<b>4,971</b>	<b>99,409</b>	<b>131,732</b>	<b>690,271</b>
<b>West</b>						
Whole.....	20,963	.....	169	734	4,035	27,008
Cut.....	195	.....	.....	14,577	1,458	16,230
Sliced.....	90,384	9,704	3,267	554	41,444	148,078
Diced.....	40,465	13,480	199	.....	16,141	74,397
Shoestring.....	27,100	314	.....	5,191	.....	32,605
<b>Total West.....</b>	<b>179,107</b>	<b>23,498</b>	<b>3,635</b>	<b>21,050</b>	<b>63,978</b>	<b>298,318</b>
<b>Total U. S.....</b>	<b>939,111</b>	<b>38,582</b>	<b>16,527</b>	<b>283,097</b>	<b>369,121</b>	<b>1,970,454</b>

### Stocks and Shipments of Canned Corn

Total stocks of canned corn, excluding corn on the cob, on February 1, 1940, were 11,005,285 actual cases, compared with 16,225,988 cases on February 1, 1939, according to figures compiled by the Association's Division of Statistics. Shipments during January, 1940, were 1,440,890 cases, compared with 1,335,031 cases shipped during January, 1939. Shipments during the seven months, August 1, 1939, to February 1, 1940, were 11,639,444 cases, against 9,430,262 cases during the same months in the previous year.

February 1 stocks of corn on the cob totaled 197,978 cases, with Eastern States holding 17,239 cases and Western States 180,739 cases.

The following table furnishes figures on total supply of canned corn in canners' hands on February 1, 1940. The figures are based on reports from 84 per cent of the canners packing sweet corn in 1939, together with estimates for the 16 per cent not reported.

Cream Style:	Eastern States	Western States
Evergreen.....	621,204	760,877
Narrow Grain.....	305,143	373,796
Country Gentleman.....	129,471	1,557,168
Crosby.....	98,805	41,479
Bantam and Golden.....	1,589,948	2,264,735
<b>Whole Kernel:</b>		
Bantam and Golden.....	609,370	2,106,629
White.....	265,469	281,191
<b>Total.....</b>	<b>3,619,410</b>	<b>7,385,875</b>

CONTENTS	PAGE
Labeling rulings.....	6101
Court dismisses area of production suit.....	6101
Watchmen subject to wage-hour law.....	6101
War emergency clauses.....	6101
Fleming's nomination favorably reported.....	6103
Stocks and shipments of pitted red cherries.....	6103
Unsold stocks of canned salmon.....	6104
Early association director dies.....	6104
New lima bean varieties.....	6104
Pack of canned beets in 1939.....	6104
Stocks and shipments of canned corn.....	6104